Supreme Court, U.S.
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No. 90-1070

In The

Supreme Court of the United States

October Term, 1990

BALBINO JIMENEZ GARAY,

Cross-Petitioner,

versus

CARNIVAL CRUISE LINES, INC.,

Cross-Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED ON CROSS-PETITION

The Cross-Respondent Carnival respectfully submits that the decision of the 11th Circuit Court of Appeals does not raise the question presented in the Cross-Petitioner's Brief. The 11th Circuit affirmed the dismissal of Garay's failure to treat claim not because of lack of a Jones Act theory upon which to support the claim but rather because it held that the issue had not been properly preserved for review. Therefore, the Cross-Respondent Carnival respectfully restates the issue presented as it relates to this Court's discretionary jurisdiction to issue a writ of certiorari:

> WHETHER AN APPELLATE COURT SHOULD CONSIDER ISSUES FOUND NOT TO HAVE BEEN PROPERLY PRESERVED FOR REVIEW.

PARTIES TO THE PROCEEDING

Carnival Cruise Lines, Inc. (Appellee), and Balbino Jimenez Garay, (Appellant) were parties before the United States Court of Appeals for the Eleventh Circuit. Carnival Cruise Lines, Inc. (Carnival) does not have any parent corporations. Carnival does have some subsidiaries or subsidiaries of subsidiaries which are not wholly owned by Carnival:

UUSI Telakkayhtio Oy

Masa-Yards Inc.

Carnival Crystal Palace Hotel Corporation Limited

Carnival Leisure Industries Limited

Carnival's Crystal Palace, U.S., Inc.

Experience The Bahamas Limited

Carnicon Lucaya Management Associates Limited

Carnicon Nevada Management Associates

Carnicon-Aruba Management Associates

Carnicon Management Associates

Carnicon St. Lucia Management Associates

Carnicon Development Company

Carnicon-Venezuela Hotel Consultants, L.C.

Carnicon Puerto La Cruz, C.A.

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OTHERS:

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STATEMENT OF THE CASE

The Cross-Petitioner, Balbino Jimenez Garay [Garay] was a seaman on a vessel operated by the Cross-Respondent, Carnival Cruise Lines, Inc. [Carnival]. Garay suffered head injuries when he fell down the stairs on board the ship. Garay sued Carnival on the basis of claims for failure to treat, maintenance and cure (including punitive damages), Jones Act negligence and unseaworthiness.

Carnival defended the case asserting, among other things, that there was insufficient evidence to support the failure to treat claim. After his accident, Garay was immediately given medical treatment on the ship, as well as on shore at the nearest port, Puerto Vallarta, Mexico. *Garay v. Carnival Cruise Lines, Inc.*, 716 F. Supp. 1421, 1422 (S.D. Fla. 1989).

Garay was airlifted to California at Carnival's expense. There he received brain surgery which saved his life. For three weeks, Garay received treatment and therapy at a hospital in San Pedro, California at Defendant's expense. *Garay*, 716 F.Supp. at 1422. At the recommendation of his treating physician, Dr. Ahn, Garay returned home to his family in Honduras, accompanied by a nurse. Garay received physical therapy once every 2 weeks for the next 3 months. (Testimony of Adela Villeda). Carnival also gave Garay funds to cover maintenance for 3 months. *Garay*, 716 F.Supp. at 1422.

The jury found in favor of Carnival on the maintenance and cure claim, the punitive damages claim, the Jones Act claim and the unseaworthiness claim. The jury found in favor of Garay on the failure to treat claim but that award was set aside by the trial judge based on

Carnival's motion for judgment notwithstanding the verdict. *Garay v. Carnival Cruise Lines, Inc.*, 716 F. Supp. 1421 (S.D. Fla. 1989). The trial court entered judgment in favor of Carnival.

Garay appealed to the 11th Circuit. The 11th Circuit reversed the judgment in favor of Carnival on the maintenance and cure claim. The 11th Circuit ordered the case remanded to the trial court for a determination of the amount of maintenance and cure due and whether punitive damages should be awarded. The 11th Circuit, however, declined to reverse the trial court's ruling regarding the "failure to treat" claim. The appellate court held that Garay did not argue that claim to the jury on the proper theory and that Garay did not present that theory in the Plaintiff's requested jury instructions. *Garay v. Carnival Cruise Lines, Inc.*, 904 F.2d 1527, 1534 (11th Cir. 1990).

Carnival petitioned this Court for a writ of certiorari on certain issues other than the failure to treat claim. (Case No. 90-875). Garay now cross-petitions for a writ of certiorari on the failure to treat issue. Contradictorily, Garay also asserts that the 11th Circuit's decision entitles him the opportunity to recover "complete maintenance and cure damages, including compensatory damages for the failure to provide maintenance and cure" on remand to the trial court. (Cross-Petition pp. 2-3).

This, however, is an incorrect reading of the 11th Circuit's opinion. The 11th Circuit limited the remand issue to the amount of maintenance (living expenses) and cure (medical expenses). No remand was made for compensatory damages. Garay's attorneys must be aware of this or otherwise they would not have cross-petitioned on

this point. There would be no need to cross-petition if they were to be allowed to raise the "failure to treat" issue again on remand.

Carnival opposes the Cross-Petition.

REASONS WHY THE CROSS-PETITION SHOULD BE DENIED

AN APPELLATE COURT SHOULD REFRAIN FROM REVIEWING ISSUES WHICH THAT COURT FOUND WERE NOT PRESENTED BELOW OR ON APPEAL.

A. The Cross-Petition is Contingent Only.

In the event this court denies Carnival's petition for writ of certiorari in case No. 90-875, then this Cross-Petition for writ of certiorari should also be denied. Carnival hopes that its petition for writ of certiorari in Case No. 90-875 will be granted. Garay, however, has opposed that petition.

Garay has further stated that "however, should the Court grant the writ, cross-petitioner requests the Court grant the cross-petitioner's writ." (Cross Petition p. i). Garay also states that the Cross-Petition should be granted "if any questions presented by the Petition is deemed worthy of consideration." (Cross-Petition p. 7). Therefore, it appears that the Cross-Petitioner Garay is asking for review only if Carnival's original petition is granted.

B. The 11th Circuit's Decision Does Not Present the Question Raised in Garay's Cross-Petition.

The 11th Circuit's opinion does not present the question presented in Garay's Cross-Petition. Garay phrases that question as follows:

> WHETHER A FINDING BY THE JURY THAT CROSS-PETITIONER (SEAMAN) WAS NOT PROVIDED WITH PROMPT AND ADEQUATE MEDICAL CARE CONSTITUTED A BREACH OF THE SHIPOWNER'S DUTIES PURSUANT TO THE JONES ACT.

It was unnecessary for the 11th Circuit to reach the issue presented by Garay's Cross-Petition because it held that the issue was waived below.

Garay's Cross-Petition states that "The 11th Circuit Court of Appeals failed to recognize that a failure to provide prompt, proper and adequate medical care is a breach under the Jones Act." (Cross-Petition pp. iii and 3). Garay's Cross-Petition ignores the fact that the very language of the 11th Circuit's opinion stated *in dicta* that there was a Jones Act cause of action for failure to pay maintenance (living expenses) and cure (medical expenses).

> A shipowner's failure to pay maintenance and cure not only give (sic) rise to a claim for maintenance and cure, but may also support a cause of action under the Jones Act for breach of the duty to provide maintenance and cure.

Garay v. Carnival Cruise Lines, Inc., 904 F.2d 1527, 1533 (11th Cir. 1990).

Therefore, the 11th Circuit's opinion presents no grounds for review under the question presented in

Garay's cross-petition. There is no conflict between the 11th Circuit's opinion and any opinions of this Court.

The holding in the *Joyce* case, *infra*, cited by Garay's cross-petitioner is consistent with the 11th Circuit's opinion.

> Generally, shipowners must provide maintenance and cure to seamen injured in service of the ship. [Cases cited] On vessels lacking adequate medical facilities this duty requires the shipowner, if necessary, to promptly evacuate the injured to a hospital or put into the nearest port where treatment is available. [Cases cited] If it is established that a breach of this duty has contributed in any manner to additional pain, disability or prolonged recovery, an action for damages may be brought under the Jones Act, 46 U.S.C.A. § 688.

Joyce v. Atlantic Richfield Co., 651 F.2d 676, 684 (10th Cir. 1981).

The language in the 11th Circuit's opinion therefore presents no grounds for review by this court concerning the question presented by Garay's Cross-Petition.

C. The 11th Circuit's Holding that it Should Refrain from Reviewing an Issue Not Properly Raised Below or on Appeal is in Accord with the Law.

The 11th Circuit held that the cross-petitioner's claim was not properly raised. In discussing this point, the Eleventh Circuit stated as follows:

> Once the shipowner was under a duty to supply maintenance and cure, the shipowner's failure to comply could have been a breach under the

> Jones Act. That theory, however, was neither argued to the jury nor presented by the plaintiff's requested instructions; we decline to remand for trial of an issue that was neither presented to the initial jury, nor presented to us on appeal.

Garay v. Carnival Cruise Lines, Inc., 904 F.2d 1527, 1534 (11th Cir. 1990).

This holding does not conflict with Supreme Court authority or with the authority of other circuits. It is well settled that the theory upon which the case was tried in a court below must be strictly adhered to on an appeal or review. *Indiviglio v. United States*, 249 F.2d 549, 560 (5th Cir. 1957), *rev'd on other grounds*, 357 U.S. 574, 2 L.Ed.2d 1547, 78 S.Ct. 1381 (1958), *rev'd on other grounds, Giordenello v. United States*, 357 U.S. 576, 2 L.Ed.2d 1548, 78 S.Ct. 1387 (1958).

The general rule is that a federal appellate court does not consider an issue not passed on below. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976). For example, this Court has stated that a party who "sought no ruling upon the question from the Board or the lower court and is therefore not entitled to have it decided here." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 498, 57 S.Ct. 569, 577, 81 L.Ed. 755 (1937).

Accordingly, if the issue sought to be raised on appeal is one which should have been submitted to the jury, a failure to request that it be submitted to the jury is deemed an abandonment thereof, and an attempt to present said question or issue on appeal is improper as it constitutes matter not raised and relied on in the court below. 4 C.J.S. *Appeal & Error* § 243 (1957). Generally,

questions of whatever nature, not raised and properly preserved for review in the trial court, cannot be raised for the first time on appeal. 4 C.J.S. *Appeal & Error* § 228 (1957). *See also Pierre v. U.S.*, 525 F. 2d 933 (5th Cir. 1976).

The Cross-Petitioner (Garay) is requesting that this court review an issue which the appellate court never reached because it determined that the issue had not been properly preserved review.

D. The Issue Suggested by Garay's Cross-Petition is "Fact Bound" and Not Suitable for Review.

The issue suggested by the Cross-Petitioner does not involve issues of law widely applicable to other litigants. If the court accepted Garay's Cross-Petition for review, then two factual questions would have to be determined by this Court. The first factual question involves the question of waiver. This court would have to review the trial court record to determine whether or not the issue asserted by the cross-petition was properly raised below.

Even if this court (1) accepted Garay's Cross-Petition issue and (2) disagreed with the appellate court's finding that the issue was waived below, then another factual determination would need to be made. This factual determination is whether or not there was sufficient evidence to support Garay's failure to treat claim.

The trial court held that there was insufficient evidence to support this claim and ordered a judgment notwithstanding the verdict. *Garay v. Carnival Cruise Lines, Inc.*, 716 F. Supp. 1421 (S.D. Fla. 1989). This court has previously affirmed a directed verdict entered by a trial judge in a seaman's failure to treat case. *See De Zon v.*

American President Lines, 318 U.S. 660, 63 S.Ct. 814, 87 L.Ed. 1065 (1943).

Carnival submits that it is not the job of this court to undertake the two factual determinations set forth above. The Cross-Petitioner Garay has failed to suggest any broad legal significance to the question presented. The U.S. Supreme Court, as a court of final review, should concentrate on legal issues and not factual ones. That is why Carnival's petition for writ of certiorari originally submitted to this court in companion case No. 90-875 focused on the legal issues, not the factual ones.

The determination requested by Garay's Cross-Petition would be relevant only to the parties involved in this case and would turn on the facts present in this case. In short, the issue presented in the Cross-Petition is "fact bound." The determination of factual issues is best left to the trial court and then to review by the intermediate appellate court. The U.S. Supreme Court should focus on the legal issues. This is particularly true where no conflict of authority exists on the question presented.

CONCLUSION

For the reasons set forth above, the Cross-Petition for Certiorari should be denied.

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